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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 673.

GIACOMO D'ANDREA,
Petitioner,

vs.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above-entitled cause on August 17, 1964, and denying the motion for rehearing entered on September 11, 1964.

THE OPINIONS BELOW.

The opinion of the Board of Immigration Appeals which has not been reported, and the Order entered thereon, dated October 4, 1963, are printed in the Appendix at pages 21-25, *infra*. The opinion of the Sixth Circuit Court of Appeals and the order entered upon the Petition for Review, dated August 17, 1964, are not reported. These are printed in the Appendix on pages 25-27, *infra*. The order denying the Motion for Rehearing, dated September 11, 1964 is not reported and is printed in the Appendix at page 20, *infra*.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 17, 1964. Rehearing was denied on Sept. 11, 1964. The jurisdiction of the Supreme Court is invoked under 5 U. S. C. § 1040 and 28 U. S. C. § 1254 and § 2101(f).

QUESTIONS PRESENTED.

May the Court of Appeals sustain a deportation order entered by the Board of Immigration Appeals, upon a determination that the alien-petitioner fraudulently obtained a non quota immigrant visa as the result of his marriage to a United States citizen where the only credible, reasonable and substantial evidence discloses the citizen-wife was the only party to the marriage agreement who did not intend to fulfill the agreement?

May the Court of Appeals sustain a determination by the Board of Immigration Appeals rejecting a plea for discretionary relief upon the basis of a finding that the petitioner had failed to establish good moral character and had been guilty of adultery, where the testimony discloses the once meretricious relationship was validated by marriage and the petitioner has established himself as a responsible member of society, a devoted husband and father?

STATUTES INVOLVED.

Part V of the Immigration and Nationality Act of 1952, as amended, 8 U. S. C., § 1251 is the basic statute involved in this controversy, particularly subsections (a) (2) and (c). Also involved is 8 U. S. C., supp. IV 1959-62 ed., 1105(a) which provides for judicial review of administrative proceedings and subsection (4) which defines the burden of proof assigned to the Attorney General. Subsection (e) of the foregoing statute fixes the

standard for the invocation of discretionary relief, voluntary departure, as may be applicable where suspension of deportation is sought. The Revised Code of Ohio is pertinent, R. C. 2905.08, insofar as it defines "adultery" as a criminal offense in Ohio. The pertinent portions of the foregoing statutes are set out in the Appendix at pages 18-20, *infra*.

STATEMENT OF THE CASE.

The petitioner is an Italian citizen, now twenty-three years of age. He entered the United States on May 6, 1960, upon presentation of a non quota immigrant visa obtained upon the basis of his marriage to Jennie Rotta, a United States citizen, in Licata, Italy on Nov. 29, 1959.

Chronologically, the sequence of events leading up to the marriage and the circumstances of its dissolution represent the factual backdrop against which the legal issues arise.

The Immigration and Naturalization Service, on December 31, 1962, seven months after his divorce had become final (Ex. 1; Tr. 3) served the petitioner with an order to show cause why he should not be deported.

The principal witness who appeared to testify against him at the hearing on January 8, 1963, was the citizen ex-wife of the petitioner, who also made an ex-parte statement on December 7, 1961, which became part of the administrative record as Exhibit 2, Tr. 6.

She stated the petitioner's uncle, Angelo D'Andrea, who lived in Cleveland, Ohio, called her at her home in Erie, Pennsylvania (Ex. 2, p. 2). The uncle told her his adopted son had just died and he wanted to bring his nephew, Giacomo (the petitioner) to the United States. He told Jennie (the ex-wife) he had tried unsuccessfully to find an appropriate bride for his nephew in Cleveland.

The ex-wife, a door-to-door cosmetics saleslady, agreed to look for a prospective bride in Erie. (Ex. 2, p. 2.) On her cosmetics rounds, Jennie met a girl, Angela D'Angelo, who was interested in marriage but agreed to go to Italy *only upon condition* that she would marry Giacomo if she loved him and he loved her.

The uncle came to Erie to meet Angela's parents. They consented to the marriage (Ex. 2, p. 3) under the conditions laid down by Angela, but they insisted on a chaperone for their daughter. Jennie agreed to act as chaperone and the uncle agreed to pay round trip fare for both, $100 in spending money, and to provide $500 for the wedding if the youngsters decided to go forward with the marriage.

The nephew in Italy at the time knew nothing about the arrangement Jennie had effected with the uncle and Angela. (Tr. p. 9.) She never communicated with Giacomo.

When Jennie and Angela got to Italy they were met by the D'Andrea family and went to their home in Licata. Later Angela and Giacomo decided they did not want to marry. (Tr. p. 11; Ex. 2, p. 3.)

Jennie wired the uncle that Angela had "backed out" and he wrote asking whether Jennie would marry his nephew.

"I thought it over and finally agreed to marry Giacomo after talking it over with his people," Jennie stated. (Ex. 2, p. 3.)

She testified:

> "I told him that I would marry him and bring him to the United States so that he could go and live with his aunt and uncle, and after he got here if he wanted a divorce he could get the divorce and stay with his aunt and uncle and that was the whole purpose." (Tr. p. 20.)

The testimony reflects that if such was the "whole purpose" it was known only to her. She stated the arrangements were made with the aunt and uncle and Angela.

> "He's (Giacomo) an innocent bystander and so is the aunt and uncle. They knew nothing of it" (her purpose). (Tr. p. 21.)

There is no doubt that Giacomo and Jennie never had sexual relations. The reasons are in sharp dispute. Jennie stated Giacomo made no attempt to consummate the marriage. (Tr. p. 18.) Giacomo testified he attempted repeatedly to do so but was rejected by Jennie. (Tr. pp. 36, 37, 39.)

When Jennie returned to the United States she filed appropriate documents to obtain nonquota immigrant visa rights for Giacomo. When he arrived in the United States, he went directly to his wife's home in Erie. She ordered him from the house. (Tr. pp. 36-37.) He came to Cleveland and lived briefly with his aunt and uncle. He attempted to re-establish his marital relationship and was arrested by Erie police upon complaint of Jennie. He was told to stay away from her home. (Tr. p. 39.)

Jennie started divorce proceedings in Erie, but failed to pursue the suit to decree. (Tr. p. 39.)

It was during the period of rejection that he began the relationship with his present wife, Angela. He had first met her when they were children in Italy. He saw her again briefly in Italy, when she visited the D'Andrea home after his marriage in Licata.

Giacomo saw her again in Erie when Angela was invited to stay with them while looking for a job. She later went to Cleveland and lived in the house of the uncle while Giacomo also was living there. (Tr. p. 46.)

During this relationship (Tr. p. 42) Giacomo fathered

two children, a son, Raimondo, born May 23, 1961, and a daughter, Mary Jo, born Aug. 3, 1962.

When Jennie failed to prosecute her own divorce litigation, Giacomo instituted suit in Cleveland. He was granted a final decree on May 16, 1962 and immediately married Angela.

The petitioner maintains his family. He has a responsible job with The Cleveland Plain Dealer.

The compensation (Ex. 2, p. 4) which Jennie received for her participation in the marriage was

(a) All furniture payments for 3 months.

(b) All insurance payments during her Italian trip.

(c) Her grocery bills were paid at home.

(d) All passport and travel costs.

(e) Payment of a miscellaneous $22 bill.

(f) Expense payments in Italy, a total of $700, of which she gave $500 to the D'Andrea family for the wedding.

(g) Her round trip fare to New York to meet Giacomo.

(h) Fee payment for her divorce, the sum of $300, which she used for other purposes.

The Special Inquiry Officer held the marriage was effected for the purpose of procuring the petitioner's entry as a nonquota immigrant and that he did not intend, nor did he fulfill the marital agreement. He further found the petitioner had failed to establish good moral character for the required five-year period because of his adulterous relationship with his present wife. Hence, he held the petitioner was not eligible for voluntary departure. He ordered the petitioner deported.

On October 4, 1963, the Board of Immigration Appeals sustained the deportation order.

On January 27, 1964, the petitioner filed his Petition for Review in the United States Court of Appeals for the Sixth Circuit.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals has found "There was evidence to support the finding that the sole purpose of petitioner's marriage in Italy was to evade the immigration laws." (See Opinion, p. 2.) This determination is in conflict with the credible evidence.

The Court of Appeals rejected the plea that the establishment of a de jure family relationship, in a bona fide family home, legitimating the child born of an adulterous relationship cannot expunge the technical violation of the test of "good moral character" so as to deny discretionary relief to an alien and subject him to deportation, disrupting his home and casting his family upon the mercies of public charity.

ARGUMENT AMPLIFYING REASONS.

It is respectfully submitted that the Court of Appeals is under a duty, upon a Petition For Review, to make the primary determination whether there was any "reasonable, substantial and probative evidence" (8 U. S. C. 1105a) to support the administrative determination.

Applied to the instant case, the record must disclose evidence of probative force to establish "the parties clearly understood that their marriage was to be one in form only and had as its sole purpose securing immigration benefits for the respondent." (Decision, Bd. of Imm. Appeals, p. 5.)

This determination raises the primary legal question

whether the failure or refusal "to fulfill his or her marital agreement" (8 U. S. C. 1251 (a) (c) (2)) must be a failure or refusal attributable to the *alien,* or of both parties to the marriage.

The statute does *not* condemn prearranged marriages, where the result of such marriage would be to extend nonquota visa benefits to the alien party. The law only requires the *alien* to enter into such marriage with the intent to fulfill the agreement and to establish a bona fide marital relationship.

This was particularly the situation in *Matter of M,* 7 I. N. 397, wherein a Japanese-American girl had a marriage arranged for her with a Japanese National.

The marriage arrangement was made between the father of the citizen-wife and the alien, whose purpose was to gain the benefit of nonquota immigrant status. As in the instant case, a valid marriage was intended.

The Japanese-American girl went to Japan on May 26, 1954, and there met her prospective husband for the first time. She married the Japanese on July 6, 1954, and on the same day, made application for nonquota immigrant status for her husband. She returned to the United States a year later and her husband was admitted as the spouse of an American citizen, upon presentment of a nonquota immigrant visa.

During his wife's entire stay in Japan she lived with her sister some miles from her husband's home. The marriage was not consummated there. When the husband arrived in the United States, he went to his brother's home. His wife lived with her father. He had no sexual relations with her, and made no attempt to. He testified the wife had refused.

The wife testified she refused her husband's advances

because she had become interested in another man while she was in Japan.

Within six months after her husband entered the United States, the wife obtained a judicial decree of divorce. She then returned to Japan where she married the man she had met there and, at the same time, executed an application for a nonquota immigrant visa on his behalf. That application was still pending at the time of the hearing on the Order to Show Cause which had been served on her first husband under the identical statute which is here involved.

During the hearing, the respondent stated he still loved his wife and that he had intended a valid marriage, notwithstanding he knew it was the only way he could procure preferential entry into the United States. The wife testified she wanted to re-establish her relationship with the respondent, intending to divorce her second husband and to withdraw the visa petition filed on his behalf.

The Board of Immigration Appeals' order terminated the deportation proceedings. It stated, in part:

> "* * * it is apparent that the respondent desired to come to the United States; that he was aware that he could accomplish this by marrying a United States citizen; and that arrangements were made for a native-born girl to go to Japan to marry him. These are factors which must be weighed against the respondent's testimony that he married his wife for the purpose of living together and establishing a home.
>
> * * *
>
> "* * * the alien's failure to maintain the marital status must be traceable back to fraud in the inception of the marriage and that the purpose for which the fraud was perpetrated must have been 'solely to

expedite admission to the United States.' Hence, if the parties in the instant case intended a bona fide marriage, the fact that as a consequence of the marriage the respondent received an advantage under the Immigration laws would not in itself authorize deportation."

On question of cohabitation and intercourse, the Board stated:

"* * * we are satisfied that where a marriage has been duly solemnized in accordance with the laws of that place where it is performed, the marriage comes into existence at that moment, regardless of whether it is followed by sexual intercourse." (citing *Lutwak vs. United States,* 344 U. S. 604 and *United States vs. Rubenstein,* 151 Fed. (2d) 915).

The Board then distinguished *Giannoulias vs. Landan,* 226 Fed. (2d) 356, an earlier case, under the former statute, wherein the Circuit Court had held failure to fulfill the marital agreement is sufficient to establish deportability and held the Circuit Court did not intend to make failure to fulfill the basis of deportability without *showing the failure to be the fault of the alien.*

"The special inquiry officer's seventh finding of fact shows only that the respondent 'failed to fulfill his marital agreement' but not that he refused to do so * * * in effect, the special inquiry officer held that the respondent was deportable regardless of whether he was or was not at fault. * * * With this we cannot agree * * *."

The view that the Service must show, by a preponderance of the proof, that the Alien did not fulfill his marital agreement, in order to support a deportation order, is further bulwarked by the decision of the Board of Immigration Appeals in *Matter of V,* 7 I. N. 460.

There, the burden was cast on the alien to demonstrate

he did not enter the marriage relationship to evade the immigration laws of the United States since there was a judicial annulment of the marriage less than two years after his entry into the United States.

The testimony in the hearing disclosed the respondent had sought to consummate the marriage but his wife refused and later instituted the annulment action. The Board stated:

> "We believe it (the evidence) satisfactorily establishes that the respondent entered into the marriage in good faith; and that he intended to fulfill his premarital agreement and his marriage obligations; and that his failure to carry out his intention was, to a considerable part, the result of forces over which he had no control."

In a more recent case, *Matter of T,* 8 I. N. 493, the Board of Immigration Appeals pointed out that dissolution of a marriage and earlier failure to consummate it, could result (as in the instant case) from incompatibility and while these facts are relevant, they are not decisive. The Board terminated proceedings, stating:

> "If it appears that the alien contracted the marriage in good faith, with intention to fulfill his marital obligations, the subsequent failure or dissolution of the union will not subject him to deportation. * * * Whether the marriage was consummated by intercourse is relevant, but not a decisive, consideration in appraising the alien's good faith * * *. Under the terms of the statute the respondent can avoid deportation by establishing that the annulment or divorce actually resulted from incompatibility or some other cause unrelated to evasion of the immigration laws."

The only analogous case reaching the Court of Appeals in recent years, sheds some light on the requirement that fraud must be established as against the alien entering

the marriage relationship in order to sustain a deportation order.

In *Epstratios Krayannez*, 251 F. (2d) 882, a Greek seaman had married an American citizen. Within 18 months after his last entry into the United States (he had been granted pre-examination and voluntary departure) his wife obtained a judicial decree of annulment of the marriage.

The Service took the position that an annulment rendered the entire marriage void ab initio, hence the visa had been obtained by fraud.

The court rejected this contention, stating:

> "* * * an American wife's fraud due to incapacity to contract a valid marriage might well ground annulment proceedings and so eradicate the basis for the alien's nonquota status without constituting the slightest evidence that the visa had been procured by the alien 'through fraud.' "

The general legal proposition which can be drawn from the cited cases is succinctly stated by *Gordon and Rosenfield* in their text, *Immigration Law and Procedure* (p. 428):

> "If it appears the alien contracted the marriage in good faith, with the intention to fulfill his marital obligations, the subsequent failure or dissolution of the union will not subject him to deportation. Moreover, the vitiating fraud must relate to the entry into the United States. Whether the marriage was consummated by intercourse is a relevant, but not a decisive, consideration in appraising the alien's good faith."

Three facets of the factual background require comment. First, the disparity between the age of the petitioner and that of his wife. It is respectfully contended that

among Italians such marriages are commonplace. It is noteworthy that petitioner could have married the young lady who came to Italy for the very purpose. Differences arose between them and they decided against marriage. Thus, it is urged, the evidence discloses (as far as the petitioner is concerned) a bona fide marriage was intended.

Second, both the Board and the Circuit Court of Appeals believed the petitioner's failure to support his wife demonstrated his lack of intent to fulfill his marital agreement. It is argued that no man, faced with a language barrier, could be expected to find employment readily. If anything, his repeated attempts to reconcile with his wife bulwark the only credible testimony bearing upon his intent.

Third, the Board and the Circuit Court of Appeals emphasized the fact that the petitioner obtained the divorce, as bearing upon intent. The testimony discloses his wife *first* instituted divorce proceedings in Erie. It was during the pendency of this action, rejected by his own wife, that the illicit relationship arose between the petitioner and his present wife. A child was born of this relationship. The only *honorable* thing the petitioner could do was to pursue the divorce action which his wife had abandoned so he could be free to marry the mother of his child to legitimate him and establish a home for his family.

That home is now established. The children are being raised in a normal, healthy family atmosphere. There is no one to whom the family can turn if the petitioner is deported. To visit fraudulent intent upon the petitioner, in the face of the only credible evidence to the contrary, would visit incalculable hardship upon the petitioner and his family.

The decision of the Board is contrary to its own holdings in similar cases, and the judgment of the Court

of Appeals is in conflict with the only credible evidence in the record.

The second phase of the Argument amplyfing the Reasons For Granting The Writ deals with the judgment of the Court of Appeals in sustaining the order of the Board of Immigration Appeals in denying voluntary departure to the petitioner. This would have afforded him the right of re-entry into the United States so that his family would not be disrupted and uprooted.

The judgment of the Court of Appeals sustaining the order of the Board is bottomed upon the determination that the petitioner committed adultery, as the term is defined under Ohio law, and hence is subject to the proscription contained in 8 U. S. C., § 1101(f)(2), which denies discretionary relief to persons who offend it.

The Service has relied upon two Ohio statutes to support its contention that the petitioner should be denied voluntary departure. The Board agreed and the Court of Appeals refused to disturb the order.

Ohio's criminal statute simply states the offense:

> "O. R. C. § 2905.08, Adultery or fornication. No person shall cohabit in a state of adultery or fornication."

The statute does *not* define adultery.

The other statute deals with grounds for divorce. It states simply (O. R. C. § 3105.01): "The court of common pleas may grant divorces for the following causes: * * * (c) Adultery." The civil statute likewise does not define adultery but the relevancy of the statute, in the instant case, is obscure. The statute delineates other grounds for divorce that are not even remotely related to "good moral character." For example, under Ohio law "gross neglect of duty" may result from a faultless inability to get a job, or physical inability to be a wage earner.

There are many conflicting decisions construing the Congressional intent in the use of the words "good moral character." More recent pronouncements have inclined towards the standards of character as would be applicable under the laws of the several states. It would serve no purpose to review them.

Adopting, for the purpose of this branch of the argument, the state-law concept, it is in point to note the Ohio criminal statute requires the offenders to "cohabit."

There are only three Ohio cases defining the requirement of cohabitation as an incident of statutory violation. Single acts of fornication are not sufficient. There must be an actual living together from which it would be fair to draw the inference of cohabitation.

The Ohio Supreme Court, in *State v. Brown*, 47 O. S. 102, an incest conviction, drew a distinction between the requirements of proof as between "incest" and "adultery." The adultery statute, the court stated, was intended to prevent "a demoralizing condition * * * a *living together* in an unlawful connection * * *."

The Eighth District Court of Appeals of Ohio, in *Bacon v. State*, 3 O. L. Abs. 39, pointed out:

> "It must be shown that there was more than a single act (of intercourse), and that there must be shown the parties were living in such a state as to imply cohabitation."

An early Ohio case, *State v. Connoway, Tappan* 58, points out that the statutory use of the word "cohabitation" means "a living together in one house; a boarding or tabling together; it carries with it the idea of a fixed residence."

It is readily conceded the petitioner, during the period when his wife had ejected him from her home and had

started divorce proceedings, began an illicit relationship with his present wife. There was, undeniably, intercourse which resulted in the birth of one child out of wedlock and the conception of another.

Nevertheless, it is respectfully urged that the courts, having adopted the state-law standard of proof, must be required to abide by it where so harsh, irremedial and drastic a step as deportation is tnreatened; where deportation will disrupt the family unit; where it will uproot the family home; where it will destroy the bonds of husband and wife and father and children.

The record discloses an illicit relationship. There is no testimony of "living together" from which cohabitation may be implied, and cohabitation is the sine qua non of the statutory offense of adultery.

The policy of Ohio law is to legitimate children, not to bastardize them.

O. R. C. 2105.18, dealing with rights of children born out of wedlock, states in part:

> "When a man has children with a woman and afterward intermarries with her, such issue, if acknowledged by him as his children, will be legitimate. * * *"

There is a vast distinction between the instant case and that of, for example, *Matter of Pitzoff, Board of Immigration Appeals,* Interim Decision # 1237, decided Aug. 13, 1962.

There, the woman lived as wife and husband with a man who was married and *could not get a divorce*. There the meretricious relationship continued while the woman knew "he could not get a divorce * * *" (p. 6, Decision). Here the divorce action was pending. When it was abandoned, the petitioner filed his own. Here, there was a mutual determination to legitimate the relationship, ad-

mittedly illicit. There was a subsequent marriage. There is a normal family home. The children have been legitimated. The children are too young to feel the stigma of the departmental action. With the father deported, the family separated, they are bound to learn and suffer the sins of their parents.

CONCLUSION.

Apart from the moving personal tragedy this Petition focuses on the persons involved, the legal question it presents is one of first impression for this court. Must the fraud, which vitiates a visa obtained on the basis of an alien's marriage to a U. S. citizen, be the fraud of the alien? That is the question this Court must resolve in view of the numerous conflicting decisions bearing upon the issue.

In the light of numerous, indecisive holdings as to the standards applicable to measure "good moral character" in terms of the right to discretionary relief in deportation cases, the Petition should be granted so that uniform criteria can be established under the federal statute.

Respectfully submitted,

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APPENDIX.

STATUTE INVOLVED.

The Immigration and Nationality Act of 1952 (66 Stat. 163), as amended, provides in pertinent part:

Section 101 [8 U. S. C. 1958 ed. 1101] * * *

* * * * *

(f) For the purposes of this Act—

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

* * * * *

(2) one who during such period has committed adultery;

* * * * *

Sec. 106 [as added by Sec. 5(a) of the Act of September 26, 1961, Pub. L. 87-301, 75 Stat. 651; 8 U. S. C. supp. IV (1959-1962) 1105a]. (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U. S. C. 1031 et seq.), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 242(b) of this Act or comparable provisions of any prior Act, except that—

* * * * *

(4) * * * the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

* * * * *

Sec. 212 [8 U. S. C. 1958 ed. 1182]. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;

* * * * *

Sec. 241 [8 U. S. C. 1958 ed. 1251]. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

* * * * *

(c) An alien shall be deported as having procured a visa or other documentation by fraud within the meaning of paragraph (19) of Section 212(a), and to be in the United States in violation of this Act within the meaning of subsection (a)(2) of this section, if (1) hereafter he or she obtains any entry into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than two years prior to such entry of the alien and which, within two years subsequent to any entry of the alien into the United States, shall be judicially annulled or terminated, unless such alien shall establish to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws; or (2) it appears to the satis-

faction of the Attorney General that he or she has failed or refused to fulfill his or her marital agreement which in the opinion of the Attorney General was hereafter made for the purpose of procuring his or her entry as an immigrant.

* * * * *

Sec. 244 [as amended by Sec. 4 of the Act of October 24, 1962, Pub. L. 87-885, 76 Stat. 1247; 8 U. S. C. supp. IV (1959-1962) 1254] * * *

* * * * *

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of Section 241(a) (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

* * * * *

"No person shall cohabit in a state of adultery or fornication." Ohio Rev. Code. Ann. § 2905.08.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Entered September 11, 1964.)

Before WEICK, Chief Judge, CECIL and PHILLIPS, Circuit Judges.

Upon consideration it is ORDERED that the petition for rehearing herein be and the same is hereby denied.

It is further ORDERED that the mandate be stayed for a period of thirty days after the entry hereof, pending application to the Supreme Court for certiorari; provided that if, within such stay, there is filed with the Clerk of this Court the Certificate of the Clerk of the Supreme Court that the petition for certiorari, record and brief have been filed, such stay shall continue until final disposition by the Supreme Court.

PAUL C. WEICK,
Chief Judge.

DECISION AND ORDER OF BOARD OF IMMIGRATION APPEALS.

(Entered October 4, 1963.)

This is an appeal from the order of the special inquiry officer requiring respondent's deportation on the ground stated above. The respondent's application for voluntary departure was denied. The appeal will be dismissed.

Respondent, a 22-year-old married male alien, a native and citizen of Italy, was admitted to the United States on May 6, 1960 upon presentation of a nonquota visa issued to him as the spouse of an American citizen. The Service claims that respondent entered into a marriage that was one in form only, that it was entered into for the purpose of securing his admission as an immigrant, and that he failed to fulfill the marital agreement. The respondent contends that the marriage was entered into in good faith and that it floundered because his wife refused to consummate the marriage and forced him to leave.

The facts have been fully stated by the special inquiry officer. Briefly, the record contains evidence that

the respondent's aunt and uncle, residents of Cleveland, Ohio, desiring to bring him to the United States to take the place of their son who had recently died, approached Jennie, the uncle's sister-in-law, and asked her to find an American citizen who would marry respondent so that he could be brought to the United States. Jennie found Angela D'Andrea (both are residents of Erie, Pennsylvania) who agreed to go to Italy for a three-month stay to meet the respondent and to marry him if she fell in love with him. Jennie was to go along to chaperone Angela who could speak no Italian. Expenses for both were to be paid by the aunt and uncle. The women went to Italy. Toward the end of the visit, after about two months of vacillation, Angela finally decided that she would not marry the respondent. Jennie, a United States citizen, then 52 years old, moved by the fact that the aunt and uncle had spent so much money for the trip and desiring to help them fill the void caused by the loss of their son, married respondent, then 18, and her nephew by marriage, with the understanding that the marriage was solely for the purpose of helping him to come to the United States and that it would not be consummated and the parties would not live together. The marriage occurred on November 29, 1959. Angela did not know it occurred until Jennie told her shortly after the wedding, as the women were returning to the United States. Angela corroborated Jennie's testimony on which most of the preceding summary is based.

Jennie completed the necessary immigration forms and on May 6, 1960, the respondent came to the United States. He had $60.00. He came to Jennie's apartment in Erie, Pennsylvania where she was living with her daughter, son-in-law, and one Angela Dottore (not the Angela who went to Italy with Jennie). Jennie testified

that in accordance with their understanding, respondent stayed with her until his immigration identification card came in the mail; he then left to join his aunt and uncle in Cleveland. She stated that during the time he had lived in Erie, she never introduced him to anyone as her husband. Respondent's version is that he left for Cleveland only after Jennie had thrown him out of the house because he had no job and she did not desire to support him. In any event respondent went to Cleveland. From his testimony, it appears that about August 1960, he began to live in Cleveland with Angela Dottore whom he had met in Italy and who after leaving Jennie had lived with respondent's uncle in Cleveland. (A son was born of this relationship on May 23, 1961, and a daughter on August 3, 1962. Respondent married her about June 1962. He supports her and the children.) Jennie testified that respondent stayed in Cleveland about three months and then returned to her stating his uncle had thrown him out. She stated that she informed him he could not live with her and the respondent agreed to return to Cleveland but only after she promised to divorce him They went to a lawyer in Erie, Pennsylvania and divorce proceedings were commenced. Respondent's version is that from Cleveland he wrote asking that Jennie stay together with him, but that Jennie did not answer, that he went back to Erie twice, staying with her a week or two the first time and a few days the second time after which she again threw him out, and that on this last occasion, both Jennie's lawyer and the police warned him not to bother her further.

Jennie failed to prosecute the divorce action she had started because she lacked money. Respondent thereupon filed a new action in Ohio serving Jennie by publication. He secured a divorce without Jennie's actual knowledge. The divorce was obtained on May 23, 1962.

Jennie testified that the marriage had never been consummated, and that respondent had made no advances to her either in Italy or the United States. Respondent's version is that the marriage had not been consummated but that this failure was due to Jennie's insistence in Italy that consummation await a church wedding in the United States, and her later refusal in the United States to go through a church wedding.

The special inquiry officer held that the respondent and Jennie never intended to be husband and wife and the marriage was made for the purpose of procuring respondent's entry as an immigrant. The special inquiry officer found that the failure to fulfill the marital agreement was partly the fault of the respondent because he had agreed not to live in a bona fide relationship. Counsel contends that respondent entered into the marriage in good faith, that he was taken advantage of by a woman who desired to obtain a free trip to Europe; that in Italy, men marry older women, and that respondent did not terminate the marriage until thrown out of his wife's house. *Matter of M-*, 7 I&N Dec. 601 is cited as authority for the proposition that if the alien is not at fault, deportation proceedings should not lie. The Acting Trial Attorney has filed a reply brief asking that the appeal be dismissed.

We believe the respondent was properly found deportable. The record establishes the parties clearly understood that their marriage was to be one in form only and had as its sole purpose securing immigration benefits for the respondent. This conclusion is a proper one in view of the wide disparity in ages between the parties, the failure of Jennie to introduce respondent as her husband, the failure to consummate the marriage, the departure of the respondent for Cleveland after he obtained his immigration document showing entry for permanent residence,

the adulterous relationship he started in Cleveland, and the corroboration Jennie's testimony has received. Thus, the record establishes that there was a secret understanding between respondent and Jennie before the marriage that the marital agreement imposed by law would not be fulfilled; and it establishes that there was no change of the secret understanding after the marriage.

The special inquiry officer properly found that the respondent's adulterous relationship within the past five years prevents him from establishing he is a person of good moral character. The establishment of good moral character is a prerequisite to the grant of voluntary departure; respondent is legally ineligible for voluntary departure.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

THOS. G. FINUCONE,
Chairman.

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Decided August 17, 1964.

Before: WEICK, Chief Judge, CECIL and PHILLIPS, Circuit Judges.

PER CURIAM. Petitioner seeks review by this Court of an order of deportation and a denial of his application for voluntary departure. He was an Italian national admitted to the United States on a nonquota immigrant visa issued to him on the basis of his marriage in Italy to a citizen of the United States. The ground for deportation was that his immigrant visa had been procured by fraud, it appearing that he had failed or refused to fulfill his marital agree-

ment which was entered into for the purpose of procuring his entry as an immigrant.

He challenged the sufficiency of the evidence to support the order of deportation and the finding that he was ineligible for voluntary departure. He had a hearing befor a special inquiry officer resulting in an adverse decision. His appeal to the Board of Immigration Appeals was dismissed.

A review of the record convinces us that there was abundant evidence to support the deportation order even though some of it was conflicting. The credibility of witnesses was for the special inquiry officer and the Board to determine. Their findings of fact are binding on us when supported by substantial evidence.

There was evidence to support the finding that the sole purpose of petitioner's marriage in Italy was to evade the immigration laws. Petitioner and his wife never lived together after the ceremony was performed. He never supported her. He later obtained a divorce from her in Cleveland. Prior to the divorce and during the marital relationship, petitioner committed adultery with a single woman. From this adulterous relationship one child was born and another conceived. After petitioner obtained the divorce, he married this woman and their second child was born. Petitioner is supporting and living with this wife and their two children.

In our opinion, the Board was justified in finding that the adulterous relationship made petitioner ineligible for voluntary departure. 8 U.S.C. § 1101(f) (2)

Judgment will be entered in favor of respondent.

ORDER DENYING PETITION FOR REVIEW.

(Filed August 17, 1964.)

On petition for review of an order of the Immigration and Naturalization Service,

This cause came on to be heard on the transcript of the record from the Immigration and Naturalization Service and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the petition to review be and the same is denied.

No costs awarded. Rule 23(4).

Approved for entry:

PAUL C. WEICK,
Chief Judge.

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JOHN F. DAVIS, CLERK

No. 673

In the Supreme Court of the United States

OCTOBER TERM, 1964

GIACOMO D'ANDREA, PETITIONER

v.

UNITED STATES IMMIGRATION and NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (R. 132;[1] Pet. 25-26) is reported at 335 F. 2d 377.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1964 (R. 131). A petition for rehear-

[1] "R." designates the consecutively paginated record now on file with the Clerk of this Court.

ing (R. 133-135) was denied on September 11, 1964 (R. 136). The petition for a writ of certior was filed on November 12, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was substantial evidence in the administrative record to support the order that petitioner be deported.

2. Whether petitioner was properly found to be statutorily ineligible for voluntary departure because he committed adultery within the five year period immediately preceding his application for such relief.

STATUTES INVOLVED

The Immigration and Nationality Act, 66 Stat. 163, as amended, 8 U.S.C. 1101 *et seq.*, provides in pertinent part:

* * * *

Sections 241(a)(2), (c), 66 Stat. 204, 208 (8 U.S.C. 1251(a)(2), (c)):

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * *
>
> (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;
>
> * * * *

(c) An alien shall be deported as having procured a visa or other documentation by fraud within the meaning of paragraph (19) of section 212(a), and to be in the United States in violation of this Act within the meaning of subsection (a)(2) of this section, if * * * (2) it appears to the satisfaction of the Attorney General that he or she has failed or refused to fulfill his or her marital agreement which in the opinion of the Attorney General was hereafter made for the purpose of procuring his or her entry as an immigrant.

Section 212(a)(19) 66 Stat. 182-183 (8 U.S.C. 1182(a)(19)):

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * *

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;

Section 244(e), 76 Stat. 1247, 1249 (8 U.S.C. 1254(e) (Supp. V)).

* * * *

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, * * * to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a

person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

Section 101(f)(2), 66 Stat. 166, 172 (8 U.S.C. 1101(f)(2):

* * * *

(f) For the purposes of this Act—

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

* * * *

(2) one who during such period has committed adultery;

* * * *

STATEMENT

Petitioner seeks review of a judgment affirming the decisions of the Board of Immigration Appeals that he was an alien subject to deportation and that he was statutorily ineligible for the discretionary relief of voluntary departure.

The relevant evidence adduced in the administrative proceedings may be summarized as follows:

Petitioner, a native and citizen of Italy, entered the United States as a non-quota immigrant in May 1960, on the basis of his marriage in November 1959 to Jennie D'Andrea (now Jennie Rotta) at Licata, Italy (R. 27). It was conceded by petitioner's counsel at the deportation hearing that petitioner never supported Jennie as his wife; that they never lived to-

gether as man and wife; and that their marriage was not consummated (see R. 4; Ex 1, R. 94-96). Petitioner claimed, however, that he did not enter into the marriage in order to evade the immigration laws.

At the time of the marriage, petitioner was 18 years old and Jennie Rotta was 52 (R. 9). She testified at the deportation hearing and a sworn statement previously made by her to the Immigration and Naturalization Service (Ex. 2, R. 97-101) was introduced into evidence. According to her account, petitioner's uncle and aunt wanted petitioner to come to the United States to live with them. They made arrangements for Jennie, who was related to petitioner by her former marriage (R. 62, Ex. 2, R. 98), to accompany a young American woman named Angela DeAngelo to Italy to see if the latter would marry petitioner (Ex. 2, R. 98-99). After a few months in Italy, Angela DeAngelo decided that she would not (R. 49, 66, Ex. 4, R. 104). Jennie then agreed to marry petitioner herself solely because his uncle had spent so much money on the trip to Italy and he and his wife were so anxious for petitioner to come to the United States (R. 51). She married him, she said, "just to bring him to the old folks" (R. 56). She testified that she never intended to live with petitioner as his wife (R. 59); that before the marriage she made it clear to petitioner and he agreed that the marriage would be terminated after he arrived in the United States (R. 59, 61, 62);[2] that she did not in-

[2] At one point in her testimony Jennie referred to petitioner as an "innocent bystander" to the marriage. She explained

tend to be his wife "in the full sense of the word" (R. 62); and that she decided to marry him and bring him to the United States "so that he could live with his aunt and uncle and after he got here if he wanted a divorce he could get the divorce and stay with his aunt and uncle and that was the whole purpose" (R. 60, 62).[3] She said that they never lived together as man and wife and that no attempt was made by either party to consummate the marriage (R. 58, Ex. 2, R. 99).

Jennie Rotta returned to the United States a few days after the marriage and made arrangements for petitioner to come here. When he arrived in this country, he stayed at Jennie's home in Erie, Pennsylvania until he received his immigration identification card (R. 56, 72, Ex. 2, R. 99.) On the day after he received his card he went to live with his uncle in Cleveland, Ohio. About three months later he returned to Jennie's home telling her that his uncle had thrown him out. She told him that he could not live with her "because that was not the idea in the first place"; that she was residing with her daughter who could not afford to support him; and that she "didn't want him as a husband just like he didn't want [her] as a wife" (Ex. 2, R. 99). He agreed to go back to his uncle but only after Jennie consented to divorce

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this by saying that she had initially prompted the marriage (R. 61).

[3] Angela DeAngelo informed immigration authorities that during the return trip from Italy Jennie told her that she did not intend to live with petitioner as his wife (R. 67, Ex. 4, R. 106).

him. She later filed suit for divorce but, without her prior knowledge, petitioner instituted a separate divorce proceeding in Cleveland and obtained a divorce in May 1962 (Ex. 2, R. 99; R. 45-46, 54-56).

Petitioner testified at the hearing that when he married Jennie he expected to have the usual husband and wife relationship with her and that he intended to remain married to her after he arrived in the United States (R. 69, 72, 75-76). He expected to but did not have sexual relations with her (R. 69).[4] He claimed that he tried to live with her as her husband but that she refused (R. 76-78). In June 1962, petitioner married Angela Dottore, who had borne him a child in May 1961; a second child was born in August 1962. He testified that he had met his present wife in Italy before his marriage to Jennie and that she had been living with Jennie when he arrived in this country but had later gone to live with his uncle (R. 82-90).

At the termination of the hearing, petitioner applied for voluntary departure in lieu of deportation if he was found deportable (R. 90).

The Special Inquiry Officer concluded that petitioner and his first wife had both been "clearly aware" that their marriage was for the sole purpose of gaining petitioner entry into the United States and that

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[4] The reason he gave for this was that Jennie insisted that they first have a church marriage. He testified that she refused to have a church wedding in Italy because she had to return to the United States where her daughter was expecting a baby and did not have time to prepare for a church wedding. After he arrived in the United States, she refused to have a church wedding until he obtained a job (R. 70-72).

they had no intention of residing together as man and wife (R. 35). Accordingly, he found that petitioner was deportable under Section 241(a)(2) and 241(c) of the Immigration and Nationality Act. He denied petitioner's request for voluntary departure on the ground that petitioner was ineligible for such relief under Section 244(e) of the Act, since he had committed adultery during the preceding five year period and under Section 101(f)(2) could not be deemed a person of good moral character (R. 36-38). The Board of Immigration Appeals affirmed (R. 8-12; Pet. App. 21-25), resting its conclusion regarding deportability on the following factors (R. 12; Pet. 24-25):

> * * * the wide disparity in ages between the parties, the failure of Jennie to introduce [petitioner] as her husband, the failure to consummate the marriage, the departure of the [petitioner] for Cleveland after he obtained his immigration document showing entry for permanent residence, the adulterous relationship he started in Cleveland, and the corroboration Jennie's testimony has received.

ARGUMENT

1. The administrative findings of fact are conclusive if "supported by reasonable substantial, and probative evidence on the record considered as a whole." Section 106(a)(4), Immigration and Nationality Act, added by 75 Stat. 651, 8 U.S.C. 1105a (a)(4) (Supp. V). It is clear that the findings in this case meet that test. All the pertinent facts point

to the conclusion that petitioner knowingly entered into the marital agreement solely for the purpose of gaining entry into the United States as a non-quota immigrant. The conflict between the testimony of petitioner and his first wife concerning the purpose of the marriage was resolved against petitioner by the Special Inquiry Officer. Apart from the uncontested facts which point to this conclusion, his first wife's testimony was corroborated to some extent by the testimony of Angela DeAngelo, who had accompanied her to Italy. The court below properly declined to substitute its judgment for that of the Special Inquiry Officer on the credibility of witnesses. See *Todaro* v. *Pederson*, 205 F. Supp. 612, 614 (N.D. Ohio), affirmed, 305 F. 2d 377 (C.A. 6), certiorari denied, 371 U.S. 891; *In re Cartellone*, 148 F. Supp. 676, 681 (N.D. Ohio), affirmed *sub nom. Cartellone* v. *Lehmann*, 255 F. 2d 101 (C.A. 6), certiorari denied, 358 U.S. 867.

2. Under Section 244(e) of the Act, the Attorney General may permit a deportable alien to depart voluntarily if the alien has been "a person of good moral character for at least five years immediately preceding his application" for such relief. Section 101(f)(2) provides that no person shall be considered to be of good moral character for a period during which he has committed adultery. Since petitioner committed adultery during the five years prior to his application for voluntary departure, his two children by his second wife having been conceived while he was still

married to his first wife, he was not eligible for voluntary departure under the statute.[8]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

DECEMBER 1964

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[8] The Ohio statute on which petitioner relies (Pet. 14-16) makes it a crime to "*cohabit* in a state of adultery or fornication [emphasis added]," O.R.C. Sec. 2905.08. See *State* v. *Brown*, 47 Ohio 102, 105-106. Assuming the doubtful proposition that the element of cohabitation which is required to make out a crime under this statute has some relevance to the application to this case of Section 101(f)(2) of the Immigration and Nationality Act (which speaks only of "adultery"), there was sufficient evidence of cohabitation. While petitioner was still married to Jennie Rotta, he and his present wife both lived at his uncle's home. One child was born to them and another was conceived before petitioner and Jennie Rotta were divorced. Petitioner and his present wife were married a month after the divorce.

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